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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. IVAN NOVA, Defendant and Appellant.	B198097 (Los Angeles County Super. Ct. No. VA094635)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Higa, Judge. Affirmed.

Benjamin S. Cardozo, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

Ivan Nova appeals following his conviction by jury of assault by means of force likely to produce great bodily injury. (Pen. Code, § section 245, subd. (a)(1); undesignated section references are to that code.) He was sentenced to a term of two years, which was suspended, and was placed on probation for three years. Appellant contends that (1) he was denied adequate notice of the charge, and due process, because the information alleged only assault with a deadly weapon (*ibid.*); and (2) the prosecutor improperly argued to the jury that appellant's hands and feet were deadly weapons. Neither contention warrants reversal, and we affirm the judgment.

FACTS

Appellant was initially charged with assault with a deadly weapon and vandalism (§ 594, subd. (a)). At the preliminary hearing, the victim, Pedro Reyes, testified that at about 2:30 a.m. on April 1, 2006, appellant and three others approached Reyes's truck, in which he was sleeping, and asked him to take them to buy beer. He refused several times, and eventually got out of his truck, after which one of appellant's companions pushed him. Appellant joined, but when Reyes fought back, appellant walked away. He later returned, with two different men, and threw a bottle at Reyes. Appellant then held Reyes, and a companion hit him. Reyes struggled with appellant, and someone else threw a cement block at Reyes, striking him in the forehead and damaging his truck.

Following this testimony, appellant's counsel argued that "it basically sounds like a fight and someone asserting self-defense. . . . [¶] I would add that what we have really is at best a battery. I don't think we've the 245. . . ." Although recognizing there was no evidence that appellant personally threw the cement block, the magistrate held appellant to answer on both counts.

Count 1 of the information alleged that on April 1, 2006, appellant committed "assault with a deadly weapon, in violation of Penal Code Section 245(a)," by assaulting Pedro Reyes "with a deadly weapon, to wit, cinder block." (Straight caps omitted.) A second count charged appellant with vandalism, by destroying a car window. Appellant moved to dismiss both counts under section 995. In the motion, appellant's trial attorney observed that appellant "has been charged with Assault With Deadly Weapon, By Means

Likely to Produce GBI. under Penal Code Section 245(a)(1) . . . ." The magistrate denied the motion as to the assault, but granted it on the vandalism count.

Appellant's case thereafter was joined with those against two other defendants, Ruben Torres and Albert Jiminez, involving the same incident. At the start of trial, nine months after filing of the information, the trial court denied, as untimely, the prosecution's motion to add enhancement allegations, of infliction of great bodily injury (§ 12022.7). In his opening statement, the prosecutor stated that the defendants were charged with, and should be convicted of, assault with a deadly weapon or assault with force likely to produce great bodily injury.

The sole trial witness was Reyes. He again testified that while sleeping in his truck, outside a Whittier apartment building where he had previously lived, he observed appellant and Torres drinking beer. Appearing intoxicated, they asked him to drive them to buy more beer. Although he had done so on previous occasions, Reyes was tired, and he declined. After the men kept pestering him, he got out of the truck and told them he simply would not take them.

When appellant tried to push Reyes, he brushed appellant's hand away. Appellant and Torres went into the apartment house. Reyes got back in his truck, but then got out to urinate. When he returned he saw appellant and Torres greeting Jiminez and another man. Jiminez walked up to Reyes. Simultaneously, appellant threw a bottle at him, which hit the ground several feet away.

Appellant then approached, and he and Reyes struck and struggled with each other. Jiminez joined in, hitting Reyes in the face and upper body. He fell to the ground, and appellant and Jiminez continued to hit him, and kick him. Reyes then felt something solid strike his forehead, and the others stopped hitting him. When he got up, he saw appellant, Jimenez, and the unidentified man about 15 feet away. During the struggle, Reyes had seen that man and Torres (who now was not visible) standing near some cement blocks. Reyes noticed that the rear window of his truck had been broken by a cement block, which had his hair and skin on it. He hadn't seen who threw it.

On cross-examination by appellant, Reyes agreed that at the preliminary hearing he had testified appellant was not the person who hit him with the block. He also testified that during the fight appellant had held him as in a hug. In response to examination by Torres, Reyes stated Torres had not pushed or punched him, nor had he seen Torres pick up, carry, or throw a cinder block.

All defendants moved for acquittal under section 1118.1, each urging he had not been shown to have thrown the cement block. Appellant emphasized that Reyes had said appellant hadn't. The prosecutor argued that appellant and Jiminez had been charged with assault both with a deadly weapon and by means of force likely to produce great bodily injury, and that their attack on Reyes could be found the latter. The trial court granted Torres's motion for acquittal, but denied appellant's. When appellant asked the court to reconsider in view of the allegations of the information, the court responded that the information had "alleged a section" – section 245, subdivision (a)(1) – which included both types of assault.

Appellant did not present an affirmative defense. Without objection, the court instructed the jury on violation of section 245, subdivision (a)(1), by means of force likely to produce great bodily injury, as well as the lesser included offense of simple assault. In his closing argument, the prosecutor made no reference to deadly weapons, or to assault with one. In his own summation, appellant's counsel insisted that the original charge had been assault with the cinder block, but that Reyes had embellished his story, regarding the beating by appellant.

The jury convicted appellant of assault by means of force likely to produce great bodily injury, but found Jiminez guilty of misdemeanor assault. At sentencing, the court denied appellant's motion for new trial, which asserted in part that failure to amend the information, or to give notice of the assault by means of force theory until presentation of the jury instructions, had deprived appellant of proper notice of that charge and of due process.

DISCUSSION

Appellant's principal contention is that he was denied fair notice of the charges, and due process, because the information never stated or reflected the charge of assault by means of force likely to produce great bodily injury, on which the jury was solely instructed, and of which appellant was convicted.[1]

Although respondent argues that appellant waived this claim by failing to object at trial to the adequacy of notice (*People v. Bright* (1996) 12 Cal.4th 652, 671), appellant did raise the contention in his motion for new trial. Present review of the contention also will avoid a repetitious claim of ineffectiveness of counsel. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

On the merits, we find appellant's claim deficient. First assault with a deadly weapon and assault by means of force likely to produce great bodily injury, set forth in section 245, subdivision (a)(1), are closely related, overlapping in concept, and not separate from each other. (*People v. Aguilar, supra,* 16 Cal.4th at pp. 1036-1037.) In a similar context, conviction for one species of an offense under an information charging another is not fatally flawed for lack of notice unless the defendant has been misled in preparing his or her defense. (See *People v. White* (2005) 133 Cal.App.4th 473, 481-483, discussing *People v. Collins* (1960) 54 Cal.2d 57.)

Here, the record demonstrates that appellant was not misled. The evidence at appellant's preliminary hearing, which is "'the touchstone of due process notice to a defendant'" (*People v. Jones* (1990) 51 Cal.3d 294, 312), reflected appellant's beating of Reyes that formed the basis of his conviction. From that evidence, appellant argued at the preliminary that only a battery, not a felonious assault, had been shown. And in his motion under section 995, appellant's trial attorney identified the charged offense as

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[1] Appellant's other contention, that the prosecutor argued to the jury a theory of assault with a deadly weapon that was legally improper under *People v. Aguilar* (1997) 16 Cal.4th 1023, 1034, is baseless. As noted above, the prosecutor in summation advanced no argument about assault with a deadly weapon.

including both aspects of section 245, subdivision (a)(1). Moreover, the lack of prejudice to appellant by the information also appears from his counsel's failure to object to the jury instruction that submitted assault by means of force likely to produce great bodily injury as the sole charge. (See *People v. Thomas* (1987) 43 Cal.3d 818, 828-829.)

We conclude that appellant received sufficient notice of the offense, and was not denied due process.

DISPOSITION

The judgment is affirmed.

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COOPER, P. J.

We concur:

FLIER, J.

BIGELOW, J.